

1 (1373)

2 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
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5 MRS. FIELDS FRANCHISING,  
6 LLC, A DELAWARE LIMITED  
7 LIABILITY COMPANY,

CASE NO. 2:14-CV-776

8 PLAINTIFF,

9 VS.

10 BEKTROM FOODS, INC., A  
11 NORTH DAKOTA CORPORATION,

SALT LAKE CITY, UTAH  
12 AUGUST 25, 2015

13 DEFENDANT.

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14 PLAINTIFF'S RENEWED MOTION TO DISMISS  
15 BEFORE THE HONORABLE BRUCE S. JENKINS  
16 UNITED STATES DISTRICT COURT JUDGE

17 APPEARANCES:

18 FOR THE PLAINTIFF:

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31 COURT REPORTER:

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1 P-R-O-C-E-E-D-I-N-G-S

2 (1:24 PM)

3 THE COURT: Good afternoon. And why don't we turn  
4 to Mrs. Fields Franchising versus Bekstrom Foods. It's  
5 14-C-776, calendared on a motion to dismiss. And those who  
6 are making appearances, if you'll make a record. Tell us who  
7 you are and whom you represent.

8 MR. ANDREASON: Good afternoon, Your Honor, Rod  
9 Andreason of Kirton McConkie on behalf of the Plaintiff,  
10 Mrs. Fields Franchising.

11 THE COURT: Okay.

12 MR. BENNION: Your Honor, David Bennion and Zach  
13 Winzeler for the Defendant, Bekstrom Foods.

14 THE COURT: Okay. You go ahead.

15 MR. ANDREASON: Thank you, Your Honor. Your Honor,  
16 the heart of this motion lies in two basic principles. One,  
17 you still have to follow the standards of Iqbal and Twombly.  
18 You need actual allegations and you need to have, not just  
19 conclusions, but plausible ones, plausible -- you need  
20 allegations and conclusions.

21 And then, secondly, if you get two chances to file a  
22 pleading and you fail to do it correctly, your pleading should  
23 be dismissed. In this case we've examined Bekstrom's answer  
24 and counterclaim once before. You reviewed it. You discussed  
25 whether or not it had conclusions or actual allegations. You

1 viewed whether they were plausible or not, and you dismissed  
2 it, giving Bekstrom the chance to replead and repair its answer  
3 and counterclaim.

4 And it did provide more detail. I'll admit, Your Honor,  
5 they've given more facts, but in some areas they have not done  
6 any additional facts and they have completely failed to  
7 provide plausible facts.

8 It's important I think, Your Honor, that we remember what  
9 the forest is here so we don't get lost in the trees. We have  
10 a license agreement, five years, guaranteed payments. They  
11 only made the first payment. So in 2012 they made their  
12 payment, but nothing in 2013, nothing in 2014, your Honor. So  
13 Mrs. Fields was well within its right to say this license  
14 agreement is done.

15 So when Bekstrom says, well, a few months later we  
16 submitted some kind of samples to you, it's too late. They've  
17 had their chance and they failed to the most material aspect  
18 of this entire agreement, making their annual guaranteed  
19 payments.

20 Mrs. Fields terminated the agreement. Bekstrom owed  
21 \$754,000. This doesn't seem to really be in dispute, Your  
22 Honor. At our last hearing you asked Bekstrom's counsel, who  
23 is here today, looking at just the words of the contract, did  
24 you pay them the \$750,000? Counsel responded we did not.  
25 Yes, the contract provided for those payments.

1           So when Bektrom complains now that Mrs. Fields didn't  
2 review samples they submitted months later, we're comparing  
3 September of 2013 to December or later, it's too late.  
4 Bektrom has already missed the boat.

5           You reviewed their counterclaim and answer and dismissed  
6 it using Twombly's two standards, and again reminding us that  
7 there have to be allegations and not conclusions, detail, and  
8 they cannot be implausible.

9           Now, you dismissed Bektrom's claims that Mrs. Fields  
10 failed to review, let alone approve, artwork, and this is what  
11 you said at the hearing, speaking to counsel for Bektrom.  
12 Frankly, I'm interested in what was submitted, when it was  
13 submitted. I have got to have, it seems to me, something more  
14 than you've got there now.

15           Well, Your Honor, they have amended their answer and  
16 counterclaim and they have provided nothing in that regard, no  
17 additional supporting information. This is a reason why this  
18 amended answer and counterclaim should be dismissed.

19           Second, you addressed Bektrom's waiver defense in which  
20 Bektrom claimed that Mrs. Fields waived the guarantee payments  
21 in order to get the royalty payments they were already  
22 entitled to get. Now, this is how Bektrom failed the first  
23 time when we talked about this before you. First, they gave  
24 only conclusions, not details. Second, this alleged agreement  
25 actually contradicts the license agreement. They're supposed

1 to give both, not just one. And, third, it was completely  
2 implausible because if Mrs. Fields is entitled to both the  
3 guarantee payments and the royalty payments, why would it give  
4 up the guarantee to get some amount of royalty payments? Why  
5 would it agree to permanently give up over \$750,000? Why  
6 would it do so in exchange for zero consideration?

7 Now, in its amended answer, to its credit, Bektrom does  
8 give more detail, but first it contradicts its prior  
9 statements. First, it says that instead of the oral waiver  
10 that it alleged last time when we appeared before you, there  
11 was actually a written modification of the license agreement.  
12 Then in its opposition frankly gives a third story, both oral  
13 and a written, three inconsistent stories, Your Honor.

14 But in this whole arena Bektrom still absolutely fails to  
15 address implausibility. Why does this make any sense that  
16 Mrs. Fields would have even made such a deal?

17 Now, Bektrom claimed that Mrs. Fields accepted its offer  
18 in writing in its pleading and then omitted to provide that in  
19 its answer and counterclaim. We asked for that, as you may  
20 have seen in the exhibits, Your Honor. They refused to  
21 provide that. So we found what they think -- we think they  
22 mean, and they have since confirmed that.

23 Here is what it says, Your Honor. And this is something  
24 that you could read to see if their allegations are plausible.  
25 This is Exhibit C to the Andreason declaration for our motion.

1       Mrs. Fields says we are fine to except the proposal but we  
2       cannot release the 190,000 order until we are paid the 40,000.  
3       If we are allied -- aligned, pardon me, we can begin drafting  
4       the documentation.

5           So clearly Mrs. Fields says, well, we can accept part but  
6       not the other part. Here is our counteroffer. There's no  
7       evidence that it was accepted. They don't claim that it was  
8       accepted. There's no payment of this \$40,000 number. The  
9       entire basis for this so-called agreement in writing -- which  
10       is not a waiver by the way. That's a written modification --  
11       is an e-mail that shows a counteroffer.

12           Now, when we look at plausibility, Your Honor, we're not  
13       getting into disputes of fact, this is their plausibility, and  
14       it doesn't weigh out.

15           Third, Bekstrom provides the new affirmative defense in  
16       its answer of fraudulent inducement of the license agreement,  
17       which is interesting since they have claims under the license  
18       agreement. So now they're saying in part that it was  
19       fraudulently induced. In fact this contradicts their previous  
20       answer where they admitted that it was a valid and binding  
21       agreement. So it's not just alternative pleading, Your Honor,  
22       it's contradictory admissions.

23           But those allegations themselves don't give any of the  
24       specificity required for fraud allegations under Rule 9(b).  
25       Bekstrom only says, and I'll quote -- I'll quote -- I'll show

1 you the quote in a moment. Mrs. Fields made, quote,  
2 representations before Bekstrom signed the license agreement  
3 that Debbie Fields was returning to Mrs. Fields and would be  
4 promoting the Mrs. Fields brand in an effort to revive the  
5 declining value of the Mrs. Fields' marks.

6 Your Honor, I'd submit pretty plainly that doesn't meet  
7 Rule 9(b) for pleading fraud with particularity. And they  
8 make allegations, they make claims, that they're entitled to  
9 damages for breach of the license agreement. So that new  
10 affirmative defense of fraudulent inducement should fall.

11 Next on the gift sets -- and it's hard to keep some of  
12 these straight, Your Honor, so I have to look at my notes to  
13 check too. But let's talk about the gift sets for a moment.  
14 Bekstrom Claims that because the license agreement makes two  
15 references to gift sets, that it now has an exclusive license  
16 to sell anything to anyone as long as it's a gift in a set.

17 But, Your Honor, it can't be that broad, and there's no  
18 evidence, there's no even allegation, that it is that broad.  
19 If it were so, not only could they submit an oven mitt, they  
20 could potentially say that a portable stove was part of a gift  
21 set, and that they had an exclusive license to provide such  
22 gift sets.

23 It's completely implausible. It contradicts the terms of  
24 the license agreement, which only gives three things that they  
25 have an exclusive license for: Spice shakers, spice grinders,

1      dry baking mixes. That's it. So to say that we can now do a  
2      gift set and no matter what, Love Cooking or any other entity  
3      we have an exclusive license to, we have the exclusive right  
4      to provide anything that's a gift in a set is completely  
5      implausible. Bekstrom has no definition or limitation  
6      regarding these gift sets. They don't even try to make it fit  
7      within section four of the license agreement that issues the  
8      exclusive agreement.

9           Worse, Bekstrom claims that Mrs. Field, quote, withdrew  
10     approval after Bekstrom had expended resources developing and  
11     manufacturing the licensed products. But, Your Honor, we've  
12     provided the actual e-mail they're referencing. That's  
13     Exhibit D to the Andreason declaration. The withdrawal of  
14     approval happened two hours later.

15           Now, I'm not sure what Bekstrom thinks it did in those two  
16     hours, but it's highly implausible to claim that it expended  
17     tremendous resources and is entitled to compensation because  
18     of two hours change in withdrawing approval for these gift  
19     sets. In its opposition Bekstrom really has no answer for why  
20     this discrepancy exists, why it would have these claims based  
21     on two hours of delay in the withdrawal time.

22           Next the spice shakers and grinders, Your Honor. Bekstrom  
23     provides an unsigned letter purporting to show that in  
24     December of 2013 Bekstrom submitted artwork and samples for  
25     spice shakers and grinders to Mrs. Fields. But as we've

1 already discussed, this was months after it had already  
2 committed the breach of failing to provide the fundamental  
3 part of the agreement, that guarantee payment, \$150,000, which  
4 it frankly hasn't provided since either.

5 As I'm sure you've dealt with many times, under Utah law,  
6 and I'm quoting here from *Cross v. Olson*, referenced from one  
7 of our cases in our brief, under the first breach rule, a  
8 party first guilty of a substantial or material breach of  
9 contract cannot complain if the other party thereafter refuses  
10 to perform. He can neither insist on performance by the other  
11 party nor maintain an action against the other party for a  
12 subsequent failure to perform.

13 And as you know, on a motion to dismiss we're talking  
14 about maintaining an action. They cannot maintain an action  
15 for events after September 30, 2013, and that's what they're  
16 trying to do.

17 Ultimately, Your Honor, this is a plain contract dispute.  
18 They admit they didn't make the payments. They have several  
19 responses but none of them are plausible. They've been given  
20 a chance to provide additional information, to make the detail  
21 sufficient and not just be conclusions, and also to make  
22 plausible ones, but they haven't done it.

23 As we pointed out last time, on a policy basis, if we  
24 proceed past this point in the case, we're going to have  
25 mountains of discovery, a lot of waste and time and money over

1 a fairly clear contract breach with no plausible response.

2 The Supreme Court in Twombly says we dismiss such claims,  
3 and then here is the quote, lest a plaintiff with a, quote,  
4 largely groundless claim be allowed to take up the time of a  
5 number of other people, with the right to do so representing  
6 an in terrorem increment of the settlement value, closed  
7 quote.

8 Your Honor, this Court has already dismissed Bekstrom's  
9 answer and counterclaim once for lack of specificity and  
10 plausibility. You gave Bekstrom another chance to plead, and  
11 they've added some specifics and missed others. Clearly they  
12 have not provided the plausibility, and therefore the Court  
13 should dismiss their answer and counterclaim. Thank you, Your  
14 Honor.

15 MR. BENNION: Your Honor, counsel has been painting  
16 with a pretty broad brush. Let's talk about the shakers  
17 and -- the spice shakers and spice grinders for a minute.  
18 First of all, right in the contract, it's an exclusive  
19 contract, with a license to use Mrs. Fields' name, brands,  
20 logos and trademarks on spice shakers and spice grinders.

21 Mrs. Fields took a \$75,000 upfront payment at the time of  
22 the contract's signing for that right. Never did Mrs. Fields  
23 give the right to Bekstrom to use its names, its marks and so  
24 forth on spice shakers or spice grinders.

25 Counsel has just said two times that reference, well,

1 that didn't happen until 2013, and they were already behind  
2 and that was the basis. That was never a basis stated by  
3 Mrs. Fields in realtime.

4 And what he's doing, as he did in the brief, just simply  
5 ignoring allegations in the amended counterclaim. For  
6 example, in paragraph 11 of the counterclaim it states in  
7 2012 -- that's a time frame that he just admitted Bektrom was  
8 current. In 2012 Bektrom submitted artwork samples for spice  
9 shakers and grinders to Mrs. Fields. Mrs. Fields'  
10 representative, Dustin Finkel, told Bektrom's representative,  
11 Aldon Reed, on at least two occasions in 2012 that Mrs. Fields  
12 was not sure that spice shakers and spice grinders were a good  
13 fit for Mrs. Fields' brand.

14 In other words, they gave a license to put the name on  
15 those items, and they took money for that license, and then  
16 when artwork and samples were submitted requesting approval  
17 for those very items that are right in the contract, they just  
18 said, ah, we don't think that's a good fit. That happened at  
19 a time when Bektrom was current, not when they were in breach.  
20 That is a breach of contract. When --

21 The Court: You claim an early breach on the part of  
22 the Plaintiff?

23 MR. BENNION: Pardon?

24 THE COURT: I say you claim an early breach on the  
25 part of the Plaintiff?

1 MR. BENNION: Yes. Yes, absolutely. In 2012 they  
2 refused --

3 THE COURT: Okay.

4 MR. BENNION: And we have a specific allegation,  
5 which he just completely ignored. He went to paragraph 12  
6 where we make a similar --

10 MR. BENNION: Well, and that's where they really get  
11 the horse in front of the cart, Judge. We make specific  
12 allegations about date, time, people, and specific  
13 communications, and then he says, well, you're not giving us  
14 detail.

19 MR. BENNION: Well, it's probably redundant, but  
20 it's the --

21 THE COURT: If it is, it's dismissed.

22 MR. BENNION: It has one viable basis that's  
23 independent, Judge, which is this. They want a payment in the  
24 future for the minimum royalties for years that haven't even  
25 happened yet when they have been in breach themselves. We

1 just want --

2 THE COURT: It's a breach question.

3 MR. BENNION: Pardon?

4 THE COURT: It's a breach question. You claim  
5 counter breaches basically.

6 MR. BENNION: We say we didn't pay because you  
7 didn't perform.

8 THE COURT: Uh-huh.

9 MR. BENNION: There's conditions precedent to our  
10 payment. Obviously the condition is you're going to let us  
11 use your name. If they don't let us use their name, how are  
12 they entitled to payment?

13 THE COURT: Okay.

14 MR. BENNION: And so --

15 THE COURT: Well, I understand that. I just don't  
16 understand the effort at getting a declaration of something.

17 MR. BENNION: It's just to try to foreclose a future  
18 obligation that they claim that we don't think should exist.

19 THE COURT: Well, why are we talking about the  
20 future? You both claim -- you both asserted breaches.

21 MR. BENNION: True.

22 THE COURT: If they breached, you're not enforcing a  
23 contract. You're dealing with the breach.

24 MR. BENNION: And so it's really an alternative --  
25 it's an alternative claim that -- that if you grant our -- if

1       you were to grant our counterclaim on breach, we wouldn't need  
2       that remedy.

3                   THE COURT: I don't think you need it at all, and  
4       I'm going to dismiss it. We don't need it. It's redundant,  
5       as you acknowledge. It's implicit in other allegations.

6                   MR. BENNION: Agreed. Your Honor, in addition to  
7       the spice shakers I wanted to comment about the mixes. Again,  
8       this is where counsel paints with a broad brush claiming, hey,  
9       mixes aren't even part of this contract. But right in the  
10      definition of licensed products, which is section four of the  
11      agreement, it says the following merchandise utilizing,  
12      bearing, or otherwise relating to the property, colon, and  
13      then it starts listing things, spice shakers, spice grinders,  
14      mix -- dry baking mixes for cupcakes, cookies and cakes,  
15      pancakes and so forth. The gift sets include and utilize  
16      those very things.

17                  Then you go to paragraph eight, which is the royalty  
18      rate, and it says for baking mixes and gift sets it's five  
19      percent. Now he's trying to argue that gift sets aren't part  
20      of this contract. Clearly it is.

21                  THE COURT: Well, are gift sets of what?

22                  MR. BENNION: Gift sets that include like a dry  
23      brownie mix with a pan, or a cake mix with an oven mitt.  
24      They're like a -- they're combo sets.

25                  And here is the other thing that he omitted. They

1 approved gift sets at certain times, and then Bekstrom made  
2 them and sold them. But then at a later time they come along  
3 and say, well, we're not going to approve those anymore  
4 because that might be in conflict with one of our other  
5 licensees. And when you --

6 THE COURT: It's obvious that you folks have got --

7 MR. BENNION: Pardon?

8 THE COURT: You've got conflicts.

9 MR. BENNION: Yeah, because in paragraph six it  
10 talks about what's the exclusivity of this contract?  
11 Exclusive. They told us we had an exclusive contract for gift  
12 sets. Then they tell us, ah, we're not sure we're going to  
13 approve these because that will conflict with our other  
14 licensee. And so that is a breach, Your Honor.

15 They can't be paid money when they refused to let us use  
16 the names that they licensed us to be able to use. It is  
17 plausible. There is a mountain of evidence, and we're way  
18 ahead of ourselves on the evidence, especially when you think  
19 about the standards of Rule 12. They draw inference after  
20 inference their way from the documents.

21 The Court: I'm interested only in the adequacy of  
22 the pleadings at this point.

23 MR. BENNION: We went above and beyond, Your Honor.  
24 When we made our answer in the first place we had basic  
25 information from our client, who is in New Jersey, and so we

1 answered. And then Your Honor dismissed the answer. And so  
2 we went back to the well and said, okay, we need details. And  
3 so, for example, I was standing right here talking about the  
4 oral conversation that my client had told me about in which  
5 they had agreed to waive the royalty. He said why would they  
6 do that? There's a very easy answer. You can get half a loaf  
7 or --

10 MR. BENNION: Pardon?

11 THE COURT: Tell me why your pleadings are adequate.

12 MR. BENNION: Because they allege specific facts  
13 that on their face are plausible to show that they breached  
14 the contract.

17 MR. ANDREASON: Your Honor, I believe I've heard  
18 only two things that I could respond to that even merit a  
19 response. One is that part of their allegations is that they  
20 claim something happened in 2012, and that is paragraph 11.  
21 They claim in that paragraph they submitted artwork samples  
22 and were told by Dustin Finkel on some two occasions, that  
23 they don't know when or how, that Mrs. Fields wasn't sure that  
24 spice shakers were a good fit.

25 Now, Your Honor, that does predate the September 30, 2013

1 material breach. I concede that. However, these allegations  
2 do not have any specificity as to when they occurred.

3 THE COURT: Well, that's one of the interesting  
4 opportunities that you have to use written interrogatories or  
5 take somebody's deposition. Tell me why their pleadings are  
6 inadequate. I've dismissed the effort to get a declaratory  
7 judgment as to one. Tell me why the remaining counterclaim or  
8 defenses are inadequate.

9 MR. ANDREASON: Your Honor, as to fraudulent  
10 inducement, as I mentioned, not adequately pleaded, doesn't  
11 meet Rule 9(b), no specific facts. So that's fraudulent  
12 inducement, Your Honor.

13 THE COURT: And while facts are essential, the  
14 Supreme Court didn't repeal the short and plain statement  
15 provision in the rules. It indicated that there ought to be  
16 enough to provide plausibility. And, quite frankly, counsel,  
17 I've looked through the material, I've looked through the  
18 pleadings, I've digested those as best I can. I thought your  
19 motion was good in reference to the declaratory judgment.  
20 We've granted that. Send me an order. As to the rest, I  
21 think it's adequate, and we'll go from there. The motion to  
22 dismiss is denied.

23 I'll save you a trip if you want to set up a scheduling  
24 time right now. File your response -- if you'll be kind  
25 enough to file your response within 10 days.

3 MR. ANDREASON: To the counterclaim, Your Honor?

4 THE COURT: I'm sorry?

5 MR. ANDREASON: Mrs. Fields' response to the  
6 counterclaim, Your Honor?

7 THE COURT: Yes. If you'll do that within 10 days.  
8 Assuming that you're going to do that, I can save you a trip  
9 if you want to tell me how soon you can get your discovery  
10 work done.

11 MR. ANDREASON: Your Honor, I probably would have to  
12 have that extra trip because I don't have that kind of time  
13 schedule laid out in front of me.

14 THE COURT: Okay. That's fine.

15 MR. BENNION: What I propose, Your Honor, is that we  
16 get together and make a proposed order.

17                   THE COURT: That would be fine, but please don't use  
18 the one that the magistrate uses.

21 THE COURT: Simple, target dates, times.

22 MR. BENNION: Will do.

23 THE COURT: Anything else we need to talk about? If  
24 not, thanks. Appreciate your help.

25 (HEARING CONCLUDED AT 1:50 PM)

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3  
4  
5 Certificate of Reporter

6 I, Raymond P. Fenlon, Official Court Reporter for the  
7 United States District Court, District of Utah, do hereby  
8 certify that I reported in my official capacity, the  
9 proceedings had upon the hearing in the case of  
10 Mrs. Fields Franchising, LLC Vs. Bektrom Foods, Inc., case  
11 No. 2:14-CV-776, in said court, on the 25th day of August,  
12 2015.

13 I further certify that the foregoing pages constitute  
14 the official Transcript of said proceedings as taken from my  
15 machine shorthand notes.

16 In witness whereof, I have hereto subscribed my name  
17 this 27th day of August, 2015.

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19

20

21 /s/ Raymond P. Fenlon

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